

Matter of: Continental Maritime of San Diego, Inc.--
Claim for Cost

File: B-249858.5

Date: December 17, 1993

Lee E. Wilson, Esq., for the protester.
Robert C. Arsenoff, Esq., and Mary G. Curcio, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Claim for protester's proposal preparation and bid protest costs is untimely since it was not filed with the agency within 60-day timeframe established by General Accounting Office Bid Protest Regulations.

DECISION

Continental Maritime of San Diego, Inc. (CMSD) requests that we determine the amount that it is entitled to recover from the Department of the Navy for the costs it incurred in preparing its proposal in response to request for proposals (RFP) No. 00024-92-R-8501 and the costs of filing and pursuing its protest in Continental Maritime of San Diego, Inc., B-249858.2; B-249858.3, Feb. 11, 1993, 93-1 CPD ¶ 230; aff'd on recon., B-249858.4, Mar. 10, 1993. In that decision, we sustained Continental's protest against the award of a contract to National Steel and Shipbuilding Company because we found that the Navy improperly evaluated National's technical proposal.

We conclude that the protester's claim is untimely filed.

We issued our decision sustaining CMSD's protest on February 11, 1993, and found that the agency should reimburse the protester for its proposal preparation and bid protest costs because no other remedy was feasible; that decision, which contained information subject to a protective order issued by this Office, was distributed at that time to CMSD's outside counsel who had been admitted to the protective order. On March 3, CMSD's outside counsel filed a request in which counsel asked that we modify our remedy to recommend termination of the contract awarded to National and award to CMSD; that request was denied on March 10.

On March 18, we distributed a redacted version of our initial decision deleting only information which was subject to the protective order to CMSD's outside counsel. On July 6, CMSD filed a claim with the Navy in the amount of \$272,636.82 for "costs regarding [its] protest" before this Office. On July 8, CMSD received the Navy's response denying its claim as untimely. This claim, which was filed in our Office on July 19, is essentially an appeal of the Navy's decision.

The Navy's position that CMSD's claim was not timely filed is based on our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(1) (1993), which provides in pertinent part that:

"The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 [working] days after receipt of the decision or the declaration of entitlement to costs. Failure to file the claim within such time shall result in forfeiture of the protester's right to recover its costs. The General Accounting Office may consider an untimely claim for good cause shown."

In its letter denying CMSD's claim, the Navy submits that the 60-day filing period ended on May 7 if measured from the February 11 date of our initial decision and, in the alternative, on June 3, if measured from the March 10 date of our decision denying CMSD's request for reconsideration. In either event, as the Navy views the matter, CMSD's claim to the agency filed on July 6 was untimely.

CMSD disputes the Navy's position, essentially arguing that it was unable to begin to prepare a detailed and certified claim until the protester received a copy of the redacted version of the initial decision sustaining its protest--a date which CMSD states that it cannot fix, but estimates to be "[q]uite sometime" after the time it received a copy of our March 10 reconsideration decision. CMSD also requests that if we find that its claim was not timely filed we still consider it under the "good cause" exception.

We need not resolve the issue of when the timeframe for filing a claim should commence in this case since even using the latest date CMSD argues should be used for beginning the 60-day filing period--the date the redacted version was received--CMSD's claim was untimely filed. If CMSD is correct in its assertion that timeliness should be measured from its receipt of a redacted version of our initial decision, such a version was distributed to the protester's outside counsel on March 18. While CMSD apparently believes that the timeliness of its claim should be measured from the time when it received the redacted version of the decision

as opposed to when its attorney received the redacted version of the decision, we measure compliance with our general timeliness requirements from the time the protester's attorney receives notice of a protestable issue. See Columbia Research Corp., B-247073.4, Sept. 17, 1992, 92-2 CPD ¶ 184. We see no reason to apply a different rule here. In the absence of any evidence to the contrary, we presume that counsel received its copy of the redacted version no later than 1 calendar week after we distributed it on March 18--i.e., March 25. Test Sys. Assocs., Inc.--Claim for Costs, 72 Comp. Gen. ___, B-244007.7, May 3, 1993, 93-1 CPD ¶ 351. Thus, even under the protester's theory, its claim filed with the Navy on July 6 was late since the 60-day timeframe would have ended on June 18 if measured from March 25.

CMSD requests in the alternative that we consider its claim under the "good cause" exception set forth in 4 C.F.R. § 21.6(f)(1). In this regard, CMSD argues that our decision awarding it costs presented the small business with "an unparalleled and complex task" for which it had to retain outside professional services to assist in claim preparation regarding allocation of costs and proper certification of its claim. Continental further argues that when bidding the contract, the firm "never imagined" that it would be required to detail and certify the time incurred by its employees and consultants. According to Continental, its small in-house staff was thus required to reconstruct the time spent on proposal preparation during an extremely busy time when it was preparing bids for a number of contracts to make up for the revenue it lost when the Navy improperly awarded a contract to National. Moreover, CMSD submits that it had to await the end of its fiscal year on May 31 in order to accurately determine its claimed costs on the basis of a year-end audit.

Our Regulations are clear--a protester that fails to comply with the 60-day claim filing requirement "shall" forfeit its right to reimbursement. Test Sys. Assocs., Inc.--Claim for Costs, supra. That timeframe was specifically designed to have claims efficiently resolved and affords protesters ample opportunity to submit adequately certified claims. Id. While there is a "good cause" exception to the filing requirement, we have construed the term to mean that some compelling reason beyond the control of the protester prevented the protester from timely filing the claim. See All Am. Moving and Storage--Recon., B-243630.2, Aug. 21, 1991, 91-2 CPD ¶ 184.

In our view, CMSD knew or should have known that it might be called upon to account for its costs as soon as its protest was filed because it was then reasonably foreseeable that we might, if CMSD were successful in its protest efforts, award costs. Accordingly, we are unpersuaded by the suggestion

that the firm was "caught off guard" by our decision awarding costs. CMSD should have begun its effort to substantiate its costs much earlier than it purportedly did so that final preparation of a certified claim could have been easily accomplished within the 60-day timeframe from receipt of our decision--notwithstanding the press of other business the firm encountered during that time period and notwithstanding the alleged need to wait until the end of its fiscal year to complete the effort. CMSD's arguments thus do not constitute a compelling reason beyond the protester's control preventing a timely filing of the claim.

James F. Hinchman
General Counsel

¹We further note that if every claimant were permitted to await the end of its fiscal year to file a claim for costs, the timeframe would be rendered meaningless.